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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JANELL GREENE, Defendant and Appellant.	D074166 (Super. Ct. No. SCD275526)

APPEAL from a judgment of the Superior Court of San Diego County, Honorable David M. Rubin, Judge. Affirmed as modified.

Arthur B. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Adrianne S. Denault and Christopher P. Beesley, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted defendant Janell Greene (aka Jay Jenkins) of two felony counts of resisting an executive officer (Pen. Code,[1] § 69). Defendant pleaded guilty to five other misdemeanor counts for possession of stolen property and drug-related offenses. After staying sentence under section 654, subdivision (a) to one of the felony counts, the court sentenced defendant to four years in prison.

On appeal, defendant argues that the jury's verdict on count 2 was not supported by substantial evidence; that the trial court abused its discretion by denying a motion for mistrial; and that the abstract of judgement should be corrected to show the potential parole revocation fine as $2,400 instead of $2,700. We agree the abstract of judgment should be corrected but in all other respects affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On January 15, 2018, contractors M.F. and A.A. arrived at their job site to discover tools they had left over the weekend missing. The contractors filed a police report the same day. Three days later, A.A. discovered the tools were listed on a website by seller "Jay Jenkins." This individual, who was later identified as defendant, was attempting to resell the tools. M.F. and A.A. provided police with this updated information. The police looked up Jenkins's profile on the website and discovered that he had an active warrant for a nonviolent felony, and that in the past he had been

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1 Unless otherwise noted, all further statutory references are to the Penal Code.

2 We summarize the facts in the light most favorable to the prosecution. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain facts relevant to the claims of error are discussed *post*.

uncooperative with police. Police set up a sting operation to catch defendant selling the tools.

An undercover officer met defendant at a prearranged location. When police saw defendant with the tools in hand walking towards their location, they moved in to make an arrest. Two officers, Norris and Young, approached defendant in a marked patrol car. The defendant in response dropped the tools and ran. Both officers pursued defendant on foot.

Officers Johnson and Baker arrived in another marked patrol car to assist in defendant's apprehension. In a separate patrol car, Sergeant Barnes pulled into a driveway, attempting to block defendant's path as he was fleeing from Officers Norris and Young. Defendant avoided the sergeant's car and kept running. Officer Johnson repeated the same maneuver with his patrol car, this time causing defendant to collide with the car's bumper and fall to the ground. Officers Norris and Young arrived on foot and assisted in the effort to restrain defendant.[3]

As officers attempted to handcuff and arrest defendant, they continually yelled "stop resisting" because defendant repeatedly tried to push himself off the ground and gets his hands below his body. Because he was resisting, Officer Norris delivered two distracting blows with a closed fist to defendant's back. Officer Norris did so because he

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[3] There is some conflict in the record regarding which of the officers first arrived and attempted to restrain defendant once he had fallen to the ground. However, as discussed *post*, the record shows that all of the officers, including Norris, were involved in defendant's apprehension.

was concerned defendant may have had a weapon and because defendant refused to be handcuffed. Shortly thereafter, and with Officer Norris's assistance, the officers were able to handcuff defendant and take him into custody.

DISCUSSION

I

Sufficient Evidence Supports the Jury's Verdict on Count 2

The jury convicted defendant on count 2 of using force or violence to resist Officer Norris. As noted *ante*, defendant contends there is a lack of substantial record evidence to support this conviction. We disagree.

A. Applicable Law

On review for sufficient evidence, "[w]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 638.)

In so doing, however, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) The testimony of a single witness, if believed by the jury, is sufficient to support a conviction, unless that testimony is physically impossible or

inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272 (*Hatch*), italics omitted.)

Under section 69, subdivision (a), it is a crime to "attempt[], by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law," or to "knowingly resist[], by the use of force or violence, such officer, in the performance of his or her duty." This statute "sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.)

This court has previously established that "forceful resistance of an officer by itself gives rise to a violation of section 69, without proof force was directed toward or used on any officer." (*People v. Bernal* (2013) 222 Cal.App.4th 512, 520 (*Bernal*).)

In *Bernal*, this court found sufficient evidence to support a conviction under section 69 where the defendant tried to run from an officer who was holding on to him, causing them both to "violently" fall to the ground (*Bernal*, *supra*, 222 Cal.App.4th at p. 520); and where the defendant subsequently swung his body from one side to the other attempting to free himself from the officer's grasp. (*Ibid.*) The defendant in *Bernal* challenged his conviction under section 69 on the ground the People allegedly did not

present evidence he used force or violence in his attempt to escape arrest, including against or on the officer. (*Id.* at p. 517.)

In rejecting this challenge, we observed in *Bernal* that the section 69 offense was not "directed 'against the person' " but was instead " 'designed to protect police officers against violent interference with performance of their duties.' [Citation.]" (*Bernal, supra*, 222 Cal.App.4th at pp. 519–520.) We further observed that, " '[w]hether the purpose of violence is to inflict harm on the officers or the harm is merely incidental to the goal of facilitating the perpetrator's escape, the consequence is the same; peace officers are subjected to violence and injury.' " (*Id.* at p. 520; see *People v. Carrasco* (2008) 163 Cal.App.4th 978, 985–986 [concluding that a struggle in which a defendant was kicking, struggling, and squirming satisfied section 69's element of "force or violence"].)

B. Analysis

Defendant on appeal contends he was merely "lying face down on the ground" when Officers Norris and Young arrived. Defendant thus suggests that Officer Norris approached a passive, nonresisting arrestee and needlessly punched him in the back. The record belies defendant's version of events.

Indeed, there is ample evidence in the record that defendant used forceful resistance in attempting to escape from the restraint officers applied, including Officer Norris. (See *Bernal, supra*, 222 Cal.App.4th at p. 520.) As summarized, the record shows that Officer Norris and his partner were initially involved in the attempted stop and arrest of defendant; that both officers ran after defendant as he attempted to flee; that

three other officers also attempted to stop defendant; that when Officer Johnson successfully made contact with defendant, he continued to resist arrest; that as defendant continued to resist, Officer Norris and his partner arrived on scene; that defendant refused the officers' repeated commands to stop resisting; that because defendant refused to allow officers to handcuff him, Officer Norris delivered two distracting blows to defendant's back; that, from the time officers approached the scene to the time of defendant's arrest, defendant violently interfered with the officers in the performance of their duties, including clenching his fists and repeatedly attempting to get off the ground as the officers—including Norris—attempted to subdue him; and that as a result of the two blows delivered by Officer Norris and, with the help of the officers, defendant was finally subdued, handcuffed, and arrested.

In addition, Officer Baker corroborated Officer Norris's testimony that defendant continued to resist arrest even *after* Officers Norris and Young arrived at the scene. Although the testimony of one witness is sufficient on substantial evidence review, the testimony of multiple officers in this case supports the jury's finding on this element. Viewing the record evidence in the light most favorable to the prosecution, we conclude a reasonable jury could find beyond a reasonable doubt that defendant used forceful resistance against Officer Norris for purposes of defendant's conviction on count 2. (See *Hatch*, *supra*, 22 Cal.4th at p. 272.)

II

The Trial Court Properly Exercised Its Discretion in Denying the Mistrial Motion

Defendant contends the trial court abused its discretion by depriving him of his constitutional right to a fair trial when it denied his motion for a mistrial due to the testimony of M.F. We disagree.

A. Additional Facts

During in limine motions, the court ruled that certain convictions in defendant's past would be excluded at trial. The court reasoned that allowing into evidence all seven of defendant's prior convictions would overwhelm the jury. The court, however, found the jury would be told police knew the defendant had a felony warrant for a nonviolent offense and that he had resisted arrest in the past, which information the jury could use to assess the arresting officers' actions in this case.

At trial, two witnesses, victim M.F. and Officer Baker, separately made fleeting statements alluding to defendant's prior criminal history, beyond what the court had ruled in limine. Defense counsel objected in both instances, prompting the court in each instance to admonish the jury it was to disregard the witnesses' statements.

The defendant moved for a mistrial based on M.F.'s comments alone, claiming his testimony resulted in irreparable prejudice to defendant. As to M.F., the record shows the court found that, while there was some emotion attached to his statement about defendant, it did not result in an unfair trial.

The court then sua sponte raised "the issue of cumulative problems or errors," noting that Officer Baker also had made a fleeting comment about defendant's background. The court reiterated that it sustained the objection of defense counsel to Officer Baker's statement, and admonished the jury to disregard it. The court therefore found that there were no grounds for a mistrial and denied defendant's motion.

B. Applicable Law and Analysis

A motion for mistrial should be granted when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) A mistrial should be declared if the court is aware of prejudice to the defendant, which it judges is incurable by admonition or instruction. (*People v. Gurule* (2002) 28 Cal.4th 557, 614.) We review the denial of a mistrial motion under the deferential abuse of discretion standard. (*People v. Silva* (2001) 25 Cal.4th 345, 372; *People v. Williams* (1997) 16 Cal.4th 153, 210.)

" 'Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment.' " (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1428–1429.) " 'It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." ' " (*Id.* at p. 429.) Thus, a motion for mistrial should be granted "only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Turning to the instant case, we conclude the court properly exercised its discretion when it denied defendant's mistrial motion. As noted, the record shows the impact of the comments by M.F. and Office Baker was minimized by the court, who seized on the comments, struck them from the record, and admonished the jury not to consider them. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128 [a "brief and isolated" statement by witness that he had interviewed defendant in jail did not warrant mistrial]; *People v. Franklin* (2016) 248 Cal.App.4th 938, 956 ["none of the three vague and fleeting references to appellant's criminal history resulted in incurable prejudice"].)

Moreover, as also correctly noted by the trial court, jurors are presumed to follow the instructions of the court. Defendant has shown no evidence in the record that the jury considered the statements of M.F. or Officer Baker in reaching its verdicts. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 292 [after the court struck a witness's testimony and admonished the jury, our high court found any potential prejudice was cured, as it "presume[s], as always, that the jury followed the court's instructions"]; see generally *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [noting "the presumption that jurors understand and follow instructions [is] '[t]he crucial assumption underlying our constitutional system of trial by jury' "].)

The lack of prejudice is even clearer in the instant case because the court also considered on its own motion the potential issue of cumulative problems or errors in bringing forth Officer Baker's testimony as an additional potential ground for a mistrial. The court thus considered not only the comments of M.F., but also the testimony of Officer Baker. While the court ultimately denied the mistrial motion in the exercise of its

discretion, the record nonetheless shows it endeavored to ensure defendant received a fair trial. We therefore conclude the court did not abuse its discretion in denying defendant's mistrial motion.

III

The Abstract of Judgment Should Be Amended to Reflect the Correct Parole Revocation Fine

At sentencing, the court imposed a parole revocation fine of $2,400 under section 1202.4, subdivision (b). However, the abstract of judgement incorrectly shows the court imposing a parole revocation fine of $2,700, or $300 more than the fine imposed at sentencing.

The People concede, and we agree, that the minute order does not correspond to the oral pronouncement of the court. (See *People v. Thompson* (2009) 180 Cal.App.4th 974, 978 [noting where there is a discrepancy between the oral pronouncement of judgement and the minute order or the abstract of judgment, the oral pronouncement controls].)

DISPOSITION

The matter is remanded to the trial court to correct the abstract of judgment to show a $2,400 parole revocation fine was imposed on defendant. The court is directed to prepare a new abstract of judgment reflecting this change and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.